APR 15 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1952

No. 719

MORTON SOBELL,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1952

MORTON SOBELL, Petitioner, vs. UNITED STATES OF AMERICA.	No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Morton Sobell prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit rendered December 31, 1952 (petition for rehearing denied January 19, 1953), which decision affirmed an order of the District Court of the United States, for the Southern District of New York, denying a motion to vacate the sentence imposed on petitioner (28 U. S. C. 2255).

Opinions Below

The opinion of the Court of Appeals is reported at 200 F. (2d) 666 (R. 329);* the opinion of the District Court is reported at 108 F. Supp. 798 (R. 8). The opinion on the appeal from the earlier conviction was reported at 195 F. (2d) 583 (C. R. 1640); certiorari was denied by this Court (O. T. 1952 No. 112), 344 U. S. 838, rehearing denied 344 U. S. 889.

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* References "R. 329" are to the transcript of record printed for this petition; references "C. R. 1640" are to the transcript of record of the original trial and appeal (Nos. 111 & 112, O. T. 1952).

Statement of Matter Involved

Morton Sobell, the petitioner herein, was convicted of conspiracy to commit espionage, together with Julius and Ethel Rosenberg. The conviction was affirmed by the Court of Appeals for the Second Circuit (195 F. (2d) 583), with Judge Frank dissenting from the affirmance of this petitioner's conviction. This Court denied certiorari, and rehearing (344 U. S. 838, 889).

Shortly after denial of rehearing, petitioner, by separate motion, sought to vacate the sentence of thirty years' imprisonment that had been imposed on him. The allegations of the motion were:

> "a. That the processes of this court were abused during the pendency of this trial by the deliberate bringing about, by the prosecution, of the indictment and arrest of one William Perl, at a time calculated to produce grossly prejudicial newspaper publicity concerning both the event of the indictment and extrajudicial statements relating to it, all of which necessarily had the effect of unduly influencing the jurors sitting in petitioner's cause; the full character of the abuse, however, not having been discovered by or discoverable on behalf of petitioner until many months after petitioner's trial.
>
> b. That by a constant course of conduct prior to petitioner's trial, the Attorney General, the U. S. Attorney and their assistants, and the Director of the Federal Bureau of Investigation and his agents, together collectively referred to herein as the Prosecution, engendered an atmosphere hostile to this petitioner and pre-disposed the community from which the jurors were drawn to the belief that petitioner was an 'atom spy' and a 'member of the Klaus Fuchs spy ring' although at all times said agencies must have known that such characterizations were false, had no evidence to support them, produced none at the trial, and were seeking thereby wrongfully to insure petitioner's conviction.

c. That your petitioner and his co-defendants were so reviled and maligned and the subject of such constant and spectacular hostile newspaper and radio publicity in advance of trial, as a result of conduct by the Prosecution in openly and covertly feeding prejudicial material to the press, that it was impossible for them to receive a fair trial before an impartial jury in March of 1951, and as a result, the purported trial was but a legal gesture to register a verdict dictated by popular preconception.

d. That evidence of 'treachery and general intent to betray' was offered on the trial of petitioner in the guise of proof of specific intent to furnish secret military information, and hence the conviction based on an unconstitutional application of the Espionage Act, in conflict with the treason clause of the Constitution.

e. The prosecuting authorities knowingly used false testimony to bring about petitioner's conviction" (R. 173-4).

"f. The alleged information pertaining to the national defense, which constituted the principal subject matter of the trial herein, had been arbitrarily and unlawfully classified as secret by the military authorities, and testimony purporting to show otherwise, adduced at the trial by the prosecution, must have been false, and known to the prosecution to be false, for the reasons shown in the petition of the defendants Rosenberg dated November 24th, 1952" (R. 205).

Four of these claims ("a", "c", "e", and "f") are substantially similar to claims made in the motion to vacate the sentence of Julius and Ethel Rosenberg (R. 30-129). With respect to two of the similar claims, "e" and "f", no independent documentation or allegations were made in the supporting affidavit of petitioner's counsel (R. 201, 205). The claims "a" and "c" were given supplemental documentation (R. 177-184, 190-200).

The claims "b" and "d" are stated solely in petitioner's motion and are raised solely on his behalf on this petition for a writ of certiorari.

A detailed statement of the matter involved, as shown in the record, would serve but to duplicate, for the most part, the statement contained in the petition (No. 687, this Term) that has been filed on behalf of Julius and Ethel Rosenberg. But for an enforced separation between petitioner and his counsel, this petition would have been filed earlier, so that the common questions in the two cases might be considered together. The circumstances of such separation are deserving of notice, and are set forth in the margin.[1] They exhibit the "want of confidence in the or-

[1] While counsel was engaged in preparation of the motion under 28 U. S. C. Sec. 2255, this Court denied rehearing of the petition for certiorari, No. 112 (R. 169). Thereupon, the Director of the Bureau of Prisons gave instructions that petitioner be transferred "expeditiously" from the New York Detention Headquarters, to the maximum security prison at Alcatraz, despite an earlier representation by the Director of the Bureau of Prisons to counsel that such a course would not be followed (R. 169-170). Petitioner's counsel sought and obtained (R. 167-8) a temporary stay of transfer, to permit hasty completion of the formal motion to vacate sentence and its signature by petitioner. The United States Attorney was so intent on pressing the petitioner's transfer to Alcatraz that, according to an affidavit which he had an opportunity to contradict, but did not, he made inaccurate representations to the District Court in an effort to cause the stay to be vacated (R. 203). The District Court was pressed to, and did permit the stay of transfer to expire, although uncontradicted affidavits showed that the purpose of the transfer to Alacatraz, at the very least, was to harass and impede the representation of petitioner at the argument of the motion to vacate sentence (R. 201-203). And although the District Judge "respectfully suggested" that the transfer be deferred by the Attorney General (R. 206) petitioner was transferred to Alcatraz the morning after the stay expired (R. 306). Despite efforts to communicate by air-mail, counsel was not able to secure any comment from petitioner (R. 307, 321) with respect to matters in the U. S. Attorney's answering affidavit that dealt with matters claimed to be within petitioner's personal knowledge (R. 131, 133). It is also uncontradicted that before the authorities were informed of petitioner's intention to move to vacate the sentence (R. 169, 203), it was their penological judgment that he should be confined in Atlanta; the uncontradicted facts about his personality and background do not permit any conclusion other than that the transfer to Alcatraz was wholly arbitrary (R. 203). The District Court (R. 306-7, 320-1) and the Court of Appeals declined to interfere.

derly course of justice" (*Stroble* v. *California*, 343 U. S. 181, 201, dissenting opinion) that has been characteristic of the conduct of the prosecution from the beginning (C. R. 31-33) to the present posture of this proceeding.

This petition is limited, in the substance of its discussion, to the two points not presented by the Rosenberg petition (constructive treason and fraudulent characterization of "atom spy"), and to a third, as to which the relief sought seems warranted by the opinion of the Court of Appeals, on this record, without extended discussion (the Perl incident). But this petitioner joins in the presentation of this point, and the others pressed on behalf of the Rosenbergs: the trial was a joint trial on a one count indictment and if relief is warranted as to any, petitioner is likewise entitled to hearing or discharge.[2]

The proceedings below were consolidated, in effect, if not by formal order, in presentation to the District and Appeals Courts (R. 324-5).

The District Judge to whom the matter was referred (Ryan, J.) permitted the initial showing tendered in support of the motion to be supplemented by several affidavits (R. 207-8); he also invited offers of proof in the form of oral testimony, to support the initial showing in behalf of the petitioners' claim to hearing, but ruled severally as to these, either that he would not receive such testimony, or permit the subpoenaing of the proffered witness, or that such testimony was not relevant and material (R. 238-51).

The District Court held that petitioner was not even entitled to a hearing, on the allegations of the petition. His order denying the motion recites the formula of the statute:

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[2] Petitioner's counsel, in fact, assumed joint responsibility for the Appendix to the petition in No. 687, concerning "Scientific Theorems and Techniques for Study and Evaluation of Pre-trial Publicity Producing Community Prejudgment". This document was to have been entitled in both cases, but could not be, owing to the later filing on behalf of Sobell, for the reasons set forth in note 1, supra. Petitioner respectfully requests that it be treated as incorporated herein by reference.

"that the files and records of this case and the papers and exhibits now submitted conclusively show that the petitioner is entitled to no relief" (R. 6). Yet his opinion is replete with observations and evaluations of the facts before him (e.g., R. 11-15).

The Court of Appeals affirmed, and in so doing, stated: "Since Judge Ryan held no hearing at which testimony could be presented, it is necessary to treat as true all facts stated in the petitions and in accompanying affidavits, and to disregard all contrary statements of fact in the government's affidavits" (R. 331). And yet the Court made factual determinations: i.e., "At the time of the trial, astute counsel decided that the publicity did their clients no harm" (R. 333); "they obviously concluded that the prosecutor's statement to the press had not prejudiced the jury against them" (R. 334). But these determinations were contrary to the petitioner's sworn claims, i.e., R. 207.

It was admitted in the answering affidavits of the United States that at least one of the prosecution's witnesses must have been untruthful in relating the circumstances of his identification of petitioner's co-defendants (R. 149-50; cf. R. 86). This admission involved the revelation that a court order enjoining the exclusion of witnesses (C. R. 194-5) had been wilfully, but secretly disobeyed by the United States Attorney himself. Other misconduct of the prosecutor which was charged in the motion to vacate sentence was "categorically denied" (R. 135); yet the record impelled the District Judge to remark as to one type of conduct:

> "The issuance of ' "releases" ' and ' "statements" ' by the quasi-judicial officials entrusted with the heavy burden and grave responsibility of prosecution giving in advance of trial details of evidence which it is expected will be introduced at trial is an all too prevalent practice, which should not be encouraged. It does not aid in the administration of justice and often hampers and impedes complete investigation of the crime, which might be productive of further evidence if not of other crimes. It is opposed to all fundamental concepts of

due process and, if carried to an extreme, might result in conviction by public opinion without the benefit of jury * * *" (R. 13; 108 F. Supp. at p. 803).

During the course of the trial, one William Perl was indicted for perjury (R. 177). In the New York Times the United States Attorney, then actually engaged in petitioner's trial, was quoted as follows:

> "Mr. Saypol said also that Perl had been listed by the Government as a potential witness in the current atomic espionage trial. His intended role on the stand, Mr. Saypol added, was to corroborate certain statements made by David Greenglass and the latter's wife, who are key Government witnesses in the trial" (R. 179).

Mr. and Mrs. Greenglass were *not* corroborated at the trial, and the only Court to review the original convictions said that if they were disregarded, "The conviction could not stand" (C. R. 1648; 195 F. (2d) at p. 592). On the present appeal, however, despite the uncontradicted record showing that petitioner's counsel did not know of the Saypol press statement (R. 207), the Court of Appeals, while calling it "wholly reprehensible" and assuming that "a cautionary instruction would not suffice, and that if defendants had moved for a new trial, it should have been granted" (R. 334), denied a hearing on the ground that counsel deliberately failed to move for a mistrial (R. 334-5).

The District Court recognized that petitioner's claim with respect to the effect of the Treason clause had not previously been passed upon, on the merits, by any court (R. 24) but both he and the Court of Appeals (R. 337) rejected the contention based on Article III, Section 3 of the Constitution, without extended discussion of the merits.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254. The judgment of the Court of Appeals for the Second Circuit was entered December 31, 1952 (R. 333); petition for rehearing was filed January 14, 1953 (R. 339) and denied January 19, 1953 (R. 344).

Statute Involved

28 U. S. C. 2255:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Questions Presented

1. Whether, in view of the abolition of the English crime of "constructive treason" by the Treason clause of the Constitution, a trial involving conduct which would have been punishable prior to 1789 as "constructive treason" results in an invalid conviction when the principal proof of the defendant's alleged intent consists of testimony treated as showing loyalty to a foreign power and breach of allegiance to the United States.

2. Should a defendant who has learned after a trial, that widely broadcast and highly prejudicial pre-trial characterizations of himself, emanating from the prosecutor's office, were not only false, but known to the prosecutor to have been false, be granted a hearing under 28 U. S. C. 2255, as to his claim that he was thereby deprived of a fair trial by an impartial jury.

3. Should a defendant, whose counsel did not know of a prosecutor's press statement made and published during a trial that an individual, not a witness, would have "corroborated" one of the trial witnesses, be granted a hearing under 28 U. S. C. 2255, where the apparent purpose and probable effect of such statement was to deprive him of a fair trial, and such statement would have required the granting of a new trial if counsel had known about it and made such motion earlier.

The following additional questions are presented by the petition submitted by petitioner's co-defendants. These questions are necessarily presented by the denial of this petitioner's motion to vacate his sentence, and the affirmance of such denial.

4. Whether, in a capital case, circumstantial proof tending to show the knowing use of perjury by the prosecutor to bring about the conviction, is sufficient to warrant a hearing, under 28 U. S. C., Sec. 2255 to determine the issue (Petition in No. 687, Question No. 1).

5. Whether, where there is evidence tending to show that there was fraudulent abuse of process by the "timing" of an indictment by the prosecutor of one not then on trial, with the intent to prejudice the rights of an accused, a hearing should be granted, under 28 U. S. C., Sec. 2255, to determine whether there was such an abuse of process (Petition in No. 687, Question No. 2).

6. Whether, where there is evidence tending to show that there was a fraudulent abuse of process by the "timing" of an indictment by the prosecutor of one not then on trial, with the intent to prejudice the rights of an accused and having the effect of producing prejudicial publicity during the trial, a hearing should be granted under 28 U. S. C., Sec. 2255, to determine whether the accused was deprived of a fair trial (Petition in No. 687, Question No. 3).

7. Whether, when there is evidence tending to show pretrial publicity of a character to bring about communal prejudgment of guilt and hostility against an accused, originating from statements made by the prosecuting authorities, a hearing, under 28 U. S. C., Sec. 2255, should be granted to determine whether the accused was deprived of a fair trial (Petition in No. 687, Question No. 4).

8. Whether, in a prosecution under the Espionage Act, in which the secrecy of the information, the subject of the crime, is an essential element thereof, where there is evidence tending to show that the information was widely known and published, a hearing should be granted, under 28 U. S. C., Sec. 2255, to determine whether the information had been arbitrarily classified by the Government as "secret" (Petition in No. 687, Question No. 5).

Reasons for Granting the Writ

Important questions as to the construction and effect of the Treason clause of the Constitution, not hitherto decided by this Court, are raised by this petition. The framers of the Constitution intended to prevent the revival, in this country, of the English crime of "constructive treason" or any counterpart thereof. The question of the scope of the Treason clause, in this aspect, is of obvious general importance in a period such as the present where prosecutions for numerous offenses, which are supposed to protect the safety of the state, are prevalent. Such prosecutions are not uncommonly infected with the virulence which moved the Constitutional Convention to adopt a restrictive Treason clause. It is of great consequence, both to the liberties of our citizens and the safety of our state, that it be made clear where the line must be drawn between the type of prosecution permitted, and that forbidden, by the Treason clause.

The other questions raised by Sobell, apart from those presented in the petition in No. 687, this Term, by the Rosenbergs, on which he also relies, involve governmental conduct, abhorrent to a fair administration of justice, of which he had no pre-trial opportunity to complain. The uncontradicted allegations of the motion and supporting documentation show that petitioner was subjected to pre-trial characterizations which were not merely false, but

fraudulent, in that they were known to the prosecutor to be false, and disseminated by him without color or claim of justification for the purpose of depriving petitioner of a fair trial. The record also shows that petitioner was subjected to publicity during the trial which was so reprehensible that the Court below was of the view that it would have warranted a new trial if a contemporaneous motion had been made. But the uncontradicted record is that the publication so condemned was not known to petitioner's trial counsel at the time he is held to have "deliberately elected" to make no point concerning it.

The Circuit Court has thus sanctioned a departure from the accepted and usual course of judicial proceedings, in that the District Court declined to direct a hearing as to matters raising grave questions as to decency and fairness in the administration of justice.

1. THE TRIAL OF SOBELL WAS IN EFFECT ONE FOR "CONSTRUCTIVE TREASON". While the Espionage Act may be constitutional on its face, it is petitioner's claim that it was so construed and applied at his trial as to make that trial, in substance and effect, one for "constructive treason"—an offense which may not be dealt with by an American court or legislature. The emphasis, at the trial, on proof of petitioner's alleged breach of allegiance to the United States, and the use of such proof in the guise and place of specific intent to commit espionage, brought about an unconstitutional result—probably not intended by the draftsmen of the Act who were dealing with an offense which "loyal and disloyal alike" were to be forbidden to commit. If his contention on the merits is correct, relief should be available under 28 U. S. C. 2255. *Hans Nielson,* pet'r., 131 U. S. 176, cited with approval in *Bowen* v. *Johnson,* 306 U. S. 19, 26.

The Rejection of "Constructive Treason" in 1789

"Treason is the betrayal of allegiance" [3]; it amounts to a "breach of faith".[4] "By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives. * * * The citizen * * * owes an absolute and permanent allegiance" [5]

"The crime [of treason] is the most serious against the safety of the state". *Hurst,* op. cit., n. 3.

Insofar as legislation punishing treason was designed to protect the "safety of the state", by preventing breach of allegiance and its consequences, there were three variants, under the English law:

> "The three clauses of Edward III's, Statute of Treason which are designed to protect the safety of the state, are the clauses which make it treason [1] to compass or imagine the king's death, [2] to levy war against the king, and [3] to adhere to his enemies."
>
> 8 Holdsworth, History of English Law, 307.

The American constitutional provision is that treason shall consist "only" of two of the three types of conduct named; there was a deliberate purpose to exclude, as a category of "treason", "to compass or imagine the king's death". Hurst, Treason in the United States, 58 Harv. Law Rev. at p. 399.

The exclusion was not attributable to the mere fact that the new government was to be a republic, rather than a monarchy. *Hurst,* op. cit., at p. 429. Historically, the excesses of the English law of treason, prior to the Eighteenth Century, occurred when there was "treasonable in-

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[3] Hurst, English Sources of the American Law of Treason (1945), Wis. Law Rev. 315; Willoughby, Constitutional Law, Vol 2, p. 1124.

[4] Stephen's Commentaries on the Laws of England (19th ed., 1928), Vol. 4, p. 121.

[5] *Carlisle* v. *United States,* 16 Wall. 147, 154.

tent found by inference under the head of compassing the death of the king" (id., p. 815); *Cramer,* 325 U. S. at p. 28. "Compassing" was also known as, and is interchangeable with "constructive treason", e.g., *Hurst,* op. cit., 58 Harv. L. Rev. 429; and see Stephen, op. cit. supra, n. 4 at pp. 123-4.

If, under English law, three types of betrayal of allegiance were punishable as treason, but under the American Constitution, only two types were placed within the reach of governmental power, it seems evident that there was a measurable, practical consequence. How is this to be ascertained? "The most obvious manner in which the Constitution narrows the scope of treason is by omitting any analogue to the crime of compassing the king's death. Since most of the reprobated doctrines of the English law had developed under that head *it makes historical sense to look there for the kinds of doctrine which the framers wished to bar from the American law of treason.*" *Hurst,* op. cit., p. 816. (Emphasis supplied.)

The *betrayal of allegiance* involved in "levying war" or "adhering to an enemy" was to be punishable as treason—and *only* as treason. "We do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense another name", *Cramer,* 325 U. S. at page 45. But the *betrayal of allegiance* involved in "constructive treason" was to be outside the reach of legislative power, a restriction not to be evaded by the judiciary, which was likewise limited. "More was being done [by the framers of the Constitution] than to state what might be prosecuted under the label of 'treason'" (Hurst, op. cit., p. 425). The "elementary history of the treason clause" is said to teach us that the constitutional definition limits the power of the legislature to deal with acts which prior to 1789 "might have been punished as constructive treason" (Hurst, op. cit., p. 440).

How Sobell's Trial Became One for "Constructive Treason"

The conduct attributed to Sobell under the Espionage Act as construed and applied at the trial was characterized by the prosecutor as participation in a "plot by him, by Sobell, by the Soviet Union, and its representatives and by other traitorous Americans to deliver the safeguards of our security into the hands of a power that would wipe us off the face of the earth and destroy its peace" (C. R. 1518). This, of course, with its accent on breach of allegiance (and see below pp. 19-22) was not "mere" espionage or conspiracy to commit espionage; it was "constructive treason"; it would have been punishable before 1787 as "compassing the death of the king".

The English doctrine of "constructive treason" would reach conduct such as that for which petitioner was actually tried.

> "If the king of England and the king of France be in amity, yet if a subject of the king of England solicits by letters the king of France to invade this realm, this is high treason: it was the case of Cardinal Pole, who wrote a book to that purpose to Charles the Emperor. Co. P. C. p. 14. It is certainly an overt-act to prove treason in compassing the king's death, but it seems not an overt-act to convict him of adhering to the king's enemies, for at the time of this act done the Emperor was not an enemy. Co. P. C. p. 14."
>
> 1 Hale, History of the Pleas of the Crown (Emlyn, ed. 1778), p. 167.

See also, Foster, a Report of Some Proceedings on the Commission for the Trial of Rebels in the Year 1746 in the County of Surrey (1762, 3d ed. London, 1792), pp. 196, 197; Robinson, C. J., Charge to the Grand Jury at Toronto, March 8, 1838 (R. Stanton, Toronto, 1838), p. 17; cf., 2 Hallam, Const. Hist. Eng. (1897 ed.), pp. 364-5; and compare Weyl, Treason (1950), 28, 474.

The rationale was stated in *Storys' case,* 3 Dyer 298 b; 73 Eng. Repr. 670, during the reign of Elizabeth I. A subject who "in his practising" with the prince of a foreign realm "declared by what means, and how, and in what place the invasion might best be" is guilty of treason, even though "there is no invasion afterwards"; compassing or imagining the death of the sovereign is involved since "an invasion with power cannot be but of necessity it will trench to the destruction or great peril of the person of the prince". Or, as was said in the case of *Francis Francia,* 15 How. St. Tr. 897, 991 (Sir Thomas Bury, L.C.B. charging the jury):

> "They say there is no direct proof that he intended the life of the king, but if he kept a correspondence and promoted the intended invasion, that is in law conspiring the death of the king."

There is a seeming difficulty presented by the logic of the history of the treason clause. Conduct such as espionage for an ally, or a non-enemy, jeopardizes national security and should not be wholly without the reach of legislative power. This may be so in cases where the danger to be prevented is evident from the character of the conduct to be proscribed; in such a case, however, the existence of a duty of allegiance, and possible breach thereof is irrelevant. This is what illustrates and gives emphasis to the basic point complained of here. Such espionage may be an offense and punished where it is solely the specific crime of espionage that is the subject of a prosecution. But *betrayal of allegiance,* when claimed to be manifested by any of the English variants of "constructive treason" such as peacetime espionage, cannot be the subject of criminal prosecution, consistently with the Treason clause. Otherwise, the result will be to permit "constructive treason" to be prosecuted without even the safeguards of the two-witness rule, while the breach of allegiance involved in actual treason—such as manifested by aid and comfort to an enemy—is circumscribed with a larger area of procedural protection.

The distinction lies in the nature of the alleged mental state which is the gravamen of the prosecution. If the intent alleged and proved is the specific intent required for such a crime as espionage—i.e., the transmittal of a military secret—this is a state of mind which may be proved as to "loyal and disloyal alike". And if proof is so limited, there is absent the poisonous and passion-rousing characteristics which inhere in a proceeding where the intent sought to be proved is *breach of allegiance,* that is to say, loyalty and "devotion to another country's welfare" (C. R. 1654-5) by one whose loyalty is rightfully claimed by our own.

The "central concept" of the crime of treason is "betrayal of allegiance" (Hurst, op. cit., at p. 415). This is the "very essence" of the offense. *United States* v. *Hoxie,* 26 F. Cas. No. 15, 407 at 399-400. The words "owing allegiance to the United States" in the first Treason statute "are entirely surplus words * * *. The construction would be precisely the same, were they omitted" (per Marshall, C. J. in *United States* v. *Wiltberger,* 5 Wheat. 76, 97). That "the intention shall constitute the crime" was also the law of England, e.g., Chief Justice Abbott (later Lord Tenterden), in *Thistlewood's case,* 33 How. St. Tr. 681, 684, cited in Campbell, the Lives of the Chief Justices, vol. 4, p. 308. To be guilty, the accused traitor must "intend to betray his country by means of the act". *Cramer,* at p. 31. "Intention is at the heart of such a crime", Hurst, English Sources of the Law of Treason (1945), Wis. L. Rev. 315.[6]

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[6] The issue was at the heart of the prosecution of "Lord Haw-Haw"—William Joyce: "The question whether a man can be guilty of treason to the King has been treated as identical with the question whether he owes allegiance to the King. An act, it is said, which is treasonable if the actor owes allegiance, is not treasonable if he does not". *Joyce* v. *Director of Public Prosecution* [1946], A. C. 347, 365.

The distinction that necessarily is implied was long ago suggested as to the area where an actual enemy might be involved.

> "A fundamental distinction between the two sorts of espionage already discussed and the crime of treason by adhering to enemies is that the essence of the latter offense is the intent to breach allegiance, consummated by some overt act of aid and comfort, while in all other crimes the law looks first at the act and then at the intent."
>
> McKinney, Spies and Traitors, 12 Ill. L. Rev. 591, 612.

The same distinction was emphasized by this Court in *Cramer's* case, when it warned that Congress could not dispense with the two-witness rule by giving the crime of treason another name (325 U. S. at p. 45). The test of whether acts, which might happen to violate both the treason and an espionage statute, could be prosecuted under the latter, or only under the former, was said to depend on whether the nature of the proof at the trial eliminated "the accusation of treachery and of general intent to betray which have such passion-rousing potentialities." *Cramer*, id.

This Court's decision in *Ex Parte Quirin*, 317 U. S. 1, 38, is entirely consistent with this analysis, and in fact, bears it out. The petitioners there included both individuals owing allegiance and some who did not. The prosecution before the military tribunal did not involve any emphasis on breach of allegiance. This Court pointed out that the offense involved was complete when "they entered * * * our territory in time of war, without uniforms or other appropriate means of identification". The judgment of the tribunal before which the saboteurs were tried was not affected by consideration of whether there was a duty of allegiance, and whether it was betrayed.

But in *Sobell's* case, where court and prosecutor treated his supposed breach of allegiance as a major issue in the trial for conspiracy to spy, where such betrayal was in fact the fulcrum of the prosecution, a different result is required. The record shows that it was only by acceptance of the proposition that Communist Party membership necessarily implied such betrayal—the thesis of the Bentley testimony[7] (C. R. 964-985)—that the intent necessary to support a conviction was said to have been found.

The Court of Appeals regarded Bentley's testimony as demonstrative of "An American's devotion to another country's welfare * * * the missing link connecting the Communist Party with the Soviet Union" (C. R. 1654-5). The trial judge had charged the jury that the Government's claim, on her evidence, was that "membership in the Communist Party and adherence to its principles showed a preference for the Soviet form of government * * * that the Communist Party is dedicated to furthering the interests of the Union of Soviet Socialist Republics" (C. R. 1558). The essence of her testimony was that "The Communist Party * * * only served the interests of Moscow" "the American Communist Party carries out the directives of Moscow" (C. R. 978). It was "implicit" she said, that an American Communist "had to accept" orders from Moscow (C. R. 978-9). And when the prosecutor stumbled, the court completed the demonstration that what was purportedly involved was an "adhesive" relationship

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[7] Whether or not such "betrayal" is in fact involved in Communist Party membership, or could, according to previously accepted standards, have been the subject of testimonial demonstration (see *Douds*, 339 U. S. 382, 424, n. 2: "Most of this information would be of doubtful admissibility or credibility in a judicial proceeding"), it has now been so held. That petitioner can no longer challenge the rulings admitting, and approving the admission of the evidence, should not preclude him from asserting that the result was unexpected and so prevented him and counsel from earlier raising the effect of the treason clause on the entire proceeding.

by Americans to a foreign power, that they were "expelled when they did not adhere" (C. R. 983).[8]

The motion to vacate the sentence specifically raised the question as to whether Sobell's conviction was not brought about in violation of the Treason clause of the Constitution, by reason of unconstitutional application of the Espionage Act (R. 174, 200). The trial was in substance and in effect one for "constructive treason" which legislature and court were forbidden, by the restrictive aspect of the Treason clause, to deal with.

The trial testimony against Sobell (apart from the collateral question of alleged consciousness of guilt) came from the mouth of a single witness, Max Elitcher. The direct testimony of Elitcher, insofar as it involved Sobell, was divided into two portions; eighty-five questions relating allegedly to "intent", as supposed to be manifested by prior Communist Party membership; ninety-two questions relating to supposed participation in the conspiracy charged (C. R. 198-263). The so-called "intent" testimony, however, outweighed the testimony with respect to participation, since it was explicitly required to be connected with, and was considered with, the testimony of Elizabeth Bentley as to the significance of alleged membership in the Communist Party (C. R. 964-985).

The opening and closing statements of the prosecutor, insofar as they relate to Sobell, are pitched primarily to the theme of breach of allegiance and betrayal and/or devotion to the Soviet Union (C. R. 178, 181-4, 1515, 1517, 1518, 1519, 1520, 1529, 1531, 1535). This involved not

[8] Petitioner's objection in the Circuit Court to this testimony was based on an assumption, which has proved incorrect, that either as proof by imputation (*Schneiderman* v. *United States*, 320 U. S. 118) or as proof of propensity (Br., C. A. pp. 43-5, 49-50) the Bentley testimony was inadmissible against him. But this expectation, likewise, prevented the point concerning the Treason clause from being raised earlier.

merely the use of the epithet "traitors" and "treachery" in a loose sense, but a spelling out of the claimed betrayal.

The prosecutor said, for example:

> " * * * the primary allegiance of these defendants was not to our country" * * *.
>
> "The evidence will show their loyalty to and worship of the Soviet Union, and by their rank disloyalty to our country, these defendants joined with their coconspirators in a deliberate, carefully planned conspiracy to deliver to the Soviet Union, the information and the weapons which the Soviet Union could use to destroy us" (C. R. 181).
>
> "The evidence of the treasonable acts of these three defendants you will find overwhelming * * * these defendants have committed the most serious crime[9] which can be committed against the people of this country" (C. R. 184).
>
> "Rosenberg and Sobell * * * have been held together by one common bond: Their mutual devotion to Communism, and the Soviet Union * * *. The significance of the relation of the membership in this Party * * * their incidental allegiance to the Communist Party of the United States of America and the Communist National [sic] is revealed in the testimony of Elizabeth Bentley" (C. R. 1515).
>
> "What is the evidence of Sobell's participation here? The evidence is that Sobell had been an associate of Rosenberg since City College days. They were joined by the common bond of communism and devotion to the Soviet Union" (C. R. 1529).
>
> "I don't want you to convict them *merely* because of their communistic activities. Communism, as the testimony has demonstrated, has a very definite place in the case because it is the communist ideology which teaches worship and devotion to the Soviet Union *over our own government* * * * to serve the interests of a foreign power which today seeks to wipe us off the face of the earth. It would use the produce of these

[9] This, of course, is treason. Hurst, 1945 Wis. L. Rev. 315.

defendants, the information received from them, *from these traitors*, to destroy Americans and the people of the United Nations" (C. R. 1535). (Emphasis supplied.)

The trial judge not only refrained from interfering with this presentation of the case but placed a seal of approval on it; he told the jury:

"irrational sympathies must not shield proven traitors" (C. R. 1550).[10]

Nature and Importance of Question Presented

The question presented by this petition has not been passed upon by this Court. It has, however, intimated that a prosecution for a national security offense is immune from the treason clause only where the nature of the prosecution is such that it is directed at the "loyal and disloyal alike", without invidious emphasis on alleged disloyalty in a non-treason case. *Cramer*, id. The Supreme Court of Utah had a comparable question presented in *State* v. *Solomon*, 96 Utah 500, 87 P. (2d) 807, analyzed in Hurst, Treason in the United States, 58 Harv. Law Rev. at p. 825. The defendants were being prosecuted for riot—an offense, the overt acts involved in which might, in some circumstances support a charge of treason for levying war. But the riot conviction was reversed because the district attorney characterized the acts of the defendant as "a riot against your government". Thus, he implied that the rioters had "a subversive intent directed against our form of government";

[10] Subsequent to the denial of certiorari in Nos. 111-2, O. T. 1952, the trial judge in denying the Rosenbergs' motion to reduce sentence, said: "Throughout history the crimes of traitors stand as those most abhorred by people * * * the traitor violates all the members of his society, all the members of the groups to which he owes his allegiance" (109 F. Supp. 108, 110). Thereafter, the President said the crime charged involves "betrayal of the entire nation" and that petitioners had had "full judicial review, including that of the highest court of the land" [sic]. Statement of February 11, 1953. This petitioner's motion for reduction of sentence was also denied with allusions to his "traitorous acts" and "betrayal" (109 F. Supp. 381, 382-3).

such an intent is not only irrelevant to a riot prosecution, but is the intent required to be established to prove treason by "levying war". Hurst, op. cit. pp. 814-827. The allusion, said the Utah Court, was not only misconduct of the District Attorney, but a palpable error of the trial court (at p. 505 of 96 Utah).

In the present case, the "breach of allegiance" allegedly involved in membership in the Communist Party is required by the treason clause of the Constitution to be completely irrelevant to an espionage or espionage conspiracy prosecution. The proof and reiterated emphasis on such alleged breach of allegiance would be permissible, if an enemy were involved, only in a treason prosecution; since a non-enemy was involved, it would be permissible only in a "constructive treason" prosecution. But such a prosecution is forbidden, *in limine*, by the treason clause. And the proscription, which does not limit prosecutions which in their incidence hit "loyal and disloyal alike", is based on historical roots which are involved in the sheer initial prejudice brought about by the mere suggestion of breach of allegiance.

In response to a statement of a different point, made on behalf of the petitioners Rosenberg, with respect merely to the allusions to the defendants as "traitors" (No. 111, O. T. 1952, Pet. 27-30), Solicitor General Perlman said: "In their context, it is clear *that all that was meant* by the references was that petitioners were not acting as loyal Americans would" (emph. supp.) (No. 111, O. T. 1952, Br. Opp. 25).[11] But the role of the accusation of disloyalty in a

[11] The general accusation of treacherous mentality was seized upon, by the Solicitor General, at another point in his Brief in Opposition, to support his views on the divided opinions affirming the original conviction of Sobell on a theory of single conspiracy (p. 47):

> "The state of mind of one whose loyalties are divided as the record shows Sobell's must have been, cannot fairly be narrowly confined, as that of the *Kotteakos* or *Blumenthal* conspirators might have been, to some single or relatively limited end."

prosecution of this character may not be so lightly tossed off.[12] This Court has recently given it proper perspective. "In the view of the community, the stain is a deep one; indeed it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy'" (*Wieman* v. *Updegraff*, 344 U. S. 183, 191).

"[T]he Treason clause is the product of history and not of analytical jurisprudence * * * and it is plain that in 1787, men appreciated the potentialities of 'treason' as a political epithet." "A more tangible reason why it may be more than a matter of words whether an indictment charges treason rather than another crime is the peculiar intimidation and stigma carried by the mere accusation of treason." Hurst, op. cit. 425, 424; and see *Cramer*, 325 U. S. at p. 48.

Here involved, however, was more than the "mere accusation". Spread across the record is proof—if Bentley is to be believed—of treacherous intent; the breach of faith and trust with the United States as a sovereign and purposeful adherence and devotion to a foreign power. The prosecutor in truth looked first at the intent, insofar as Sobell was concerned, and only incidentally at the deed (C. R. 1529, 1531). His opening statement was more appropriate for a treason trial than for one directed at acts thought detrimental to our wartime safety. The evidence of Bentley fulfilled the promise of such statements as "inherent in their primary loyalty to communism was the basic devotion to Soviet Russia" (C. R. 181) which permeate his opening statement and outweigh any references to what the substantive case might be expected to show, as to Sobell.

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[12] Since the allusions to "traitors" and "treason" were in any event wholly irrelevant to any facts or issues in the case, it is difficult to reconcile the original denial of certiorari as to this point (in which Sobell joined, pet. No. 112, O. T. 1952, p. 44) with this Court's treatment of quite comparable improper prosecutive appeal to passion and prejudice in *Viereck* v. *United States*, 318 U. S. 236, 247-8.

"Betrayal" of allegiance, by devotion to a country with which we are at peace may be reprehensible (but cf. R. S. sec. 1999, 8 U. S. C. Sec. 800); it cannot be expected that alleged fondness for Russia will be viewed otherwise at this time. But the framers of our Constitution were mindful of the abuses of the Statute of Edward III, which led to the execution of Englishmen of a faction out of office, because their alleged fondness for the King of Spain, or France, or even the Pope at Rome was supposed to establish that they "compassed" the death of their king.[13]

They ordained that "constructive treason" should not be a basis for prosecution in this country. Some may think the limitation jeopardizes our defenses, in the face of dangers that could not have been foreseen by the Founding Fathers (e.g., Weyl, Treason (1950), p. 474). But the limitation exists. It does not prevent punishment of crimes such as espionage, where proof is limited to specific intent. But when evidence of treachery and general intent to betray is permitted to masquerade as "specific intent", a danger arises to our national liberties which the Founding Fathers did foresee, and provide against. They forbade the revival here of the crime of "constructive treason". And their foresight was exercised for a loose group of 13 small former colonies, whose pitiful weakness against the Europe of 1789 (which surrounded them with outposts of empire) did not prevent their inhabitants from welcoming the restrictive definition. Hurst, 58 Harv. L. Rev. at pp. 406-9.

2. THE KNOWINGLY FALSE PROSECUTOR-DISSEMINATED PRE-TRIAL CHARACTERIZATIONS OF SOBELL AS AN "ATOM SPY". The *second* specification of Petitioner's motion to vacate the sentence charged that the "Prosecution" engendered an at-

[13] "It is true," said the King's Attorney General in the time of Titus Oates, "some are so charitable as to think the Roman Catholics in England do promote the Roman Catholic religion; but that the design against the King's person is a fiction. But they shall do well to take the warning by the trial of this man." *Stayley's* case, 2 Phillipps State Trials (1836), p. 333.

mosphere hostile to him and pre-disposed the community from which the jurors were drawn to the belief that he was an "atom spy" and a "member of the Klaus Fuchs spy ring" and that the prosecution "must have known that such characterizations were false, had no evidence to support them, produced none at the trial, and were seeking thereby wrongfully to insure petitioner's conviction" (R. 174).[14]

The documentation in the supporting affidavits shows that Sobell was repeatedly so characterized from the moment of his arrest (R. 185-190). Since he was not indicted until October 10, 1950 (C. R. 6) there was no court document on file between the date of his arrest, August 18, 1950, and October 10, which could have been even the ostensible basis for the numerous press references to him as an "atom spy". No inference is possible, except that the references originated from improper press-feeding by the United States Attorney, or other prosecution agents. Several of

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[14] Petitioner urges that he and his co-defendants were entitled to raise, by motion to vacate the sentence, the question of general pre-trial publicity and its effect. Neither the District Court nor the Court of Appeals held that such questions are foreclosed, precedurally, by not having been raised before trial. These courts, improperly, took the fact that such questions were not raised, as the basis for a factual inference that the pre-trial atmosphere was not as bad as the movants claimed. Such inferences can only be made at a hearing. And the question, undecided below, as to whether the point was "waived" was likewise, necessarily the subject of a hearing. *Jennings* v. *Illinois*, 342 U. S. 104, 105, 108-110, and compare dissenting opinion at pp. 113-114, 115; *Price* v. *Johnston*, 334 U. S. 266, 291; and compare this Court's observation in *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 281, with the *per curiam* disposition in *U. S. ex rel. McCann* v. *Adams*, 320 U. S. 220, 221.

But even apart from this claim, it could not be said that there was any choice by petitioner and his counsel, not to raise the claim of deception now made. Every reasonable pre-trial effort was made to secure enlightenment as to the nature of the charge being made against petitioner (e.g., R. 184). It could not be foreseen whether among those bearing false witness, if there was to be such, would be one purporting to link Sobell directly with the atomic espionage activities. "In fact because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election." *Moser* v. *United States*, 341 U. S. 41, 47.

the newspaper stories attribute the statements to the prosecutor (R. 185). No other explanation for the references in the press was tendered in the answering affidavits on the motion to vacate the sentence, despite the "categorical denial" therein contained (R. 135).

The statements in the press referred to petitioner as an "atom spy", "A-spy", etc.; as actually participating in atomic espionage and having done so in collaboration with Julius Rosenberg, who had been burned deep in the mind of a Hiroshima-conscious urban population by such sensational publicity as was produced by the wholly indefensible press-release of July 17, 1950 (R. 161-163).

At the trial, however, no evidence was even offered by the prosecution, other than that which was claimed to show that petitioner was a member of a "general" conspiracy. The trial judge, in passing sentence on petitioner, stated: "The evidence in the case did not point to any activity on your part in connection with the atom-bomb project" (C. R. 1620). Nor did the prosecution ever claim otherwise, in any *court.*

The concurring opinion of two Justices of this Court, in *Shepherd* v. *Florida,* 341 U. S. 50, dealt with a pre-trial fraud not unlike that which is involved here. It was published, and not denied, that defendants there had confessed —and "no one, including the sheriff repudiated the story" (at p. 51). Yet no confession was offered at the trial. Defense counsel there could have made a pre-trial motion based on the *falseness* of the story. But in Sobell's case the fraud did not become complete and evident until after the trial was over. Moreover the fraud in *Shepherd* was attributable only to the newspapers; no "constitutional rights" of newspapers are involved in permitting a defendant to challenge a prosecutor's employment of the press as a sounding board for fraud and a tool of deception.

The force of the claim made in respect of the fraudulent pre-trial characterization of Sobell as an "Atom Spy" was

such that in his answering affidavits, the prosecutor could find no response to make to it; he denied neither responsibility for the pre-trial characterizations, nor the fact that they were made without color of claim or justification. In Judge Ryan's elaborate and carefully written opinion, no attempt is made to deal with it. In the Prosecutor's brief in the court below, this point was "by-passed" by a footnote, not attempting to answer it, but characterizing it as "antithetical" to the argument of the Rosenbergs.[15]

The Circuit Court, without dealing in any way with the propriety of the conduct of the prosecutor in this aspect, stated in its opinion:

> "Sobell's argument also urges that he and his counsel could not until the government rested its case have been aware of how detrimental the publicity regarding 'atom spies' was. In essence, this argument appears to be that the evidence at the trial showed that there were two conspiracies in only one of which was Sobell involved, a contention which was ruled against him on the prior appeal" (R. 332).

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[15] The entire reference was as follows:

"Appellant Sobell attempts to assert such an excuse in an argument which is antithetical to that raised by the Rosenbergs. Sobell says that the untruth of the pretrial publicity which characterized him as an atom spy was not known to him until the trial evidence failed to connect him to the espionage activities relating to the atom bomb. In effect, his argument is that had trial testimony connected him with atomic espionage, he would not have been prejudiced. This, of course, is precisely the opposite to the Rosenbergs' argument that pretrial publicity connecting them with atomic espionage was prejudicial. In any event, there is no showing by any appellant to excuse the failure to raise the *fact* of publicity prior to the opening of the trial." Brief for United States, Dec. 22, 1952, p. 8 footnote.

There is in this, of course, neither logic nor a response to petitioner's claim. There is one type of prejudice involved in pre-trial publicity whereby officials advertise their belief in a defendant's guilt. There is a further, "double" prejudice involved where the pre-trial claim is not seriously intended to be proved at the trial, and the defendant misled into the belief that it will. To argue with emphasis on one type of prejudice, as we do, does not involve in the least any "antithesis" with the other.

Of course, the point presented to the Court was that Sobell could not have known how *fraudulent* the publicity was, not "how detrimental."

It is an evasion of the issue to say, as the Court of Appeals does, that the point concerning fraudulent pre-trial publicity is in essence the same as that ruled against Sobell on the previous appeal. That point involved a question of fair trial practise in the law of conspiracy. The question here is not as to the scope of the "conspiracy" dragnet, and what injustice may be done legally in a conspiracy trial.[18]

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[18] Petitioner claimed in No. 112, O. T. 1952, that the trial court erred in not submitting the "two-conspiracy" question to the jury (Pet. 27-29). The Solicitor General's brief in opposition avoided the conflict in Circuits thus disclosed by contending that the question *had in fact* been submitted to the jury (Br. Opp. Nos. 111-112, pp. 48-50).

Petitioner respectfully shows to the Court that in consequence of the denial of certiorari in No. 112, the following proceedings took place on Sobell's motion to reduce sentence, pursuant to Rule 35, F. R. C. P.:

> "Mr. Kilsheimer (Ass't U. S. Attorney): Judge Frank's dissent was predicated purely on a legal ground concerning the charge which he thought should have been given to the jury——
>
> The Court: His dissent was purely on the ground, as I recall it, as to whether or not I should have submitted to the jury the question whether there were two conspiracies instead of one, instead of ruling on them as a matter of law.
>
> Mr. Kilsheimer: And the majority found there was sufficient in your Honor's——
>
> The Court: And I have always understood that to be the law for many years—that there was a question of law for the judge to decide." January 8, 1953, S. M. 17.

Thus, although this Court may have been persuaded by the Solicitor General that there was no conflict in Circuits, as to whether the two-conspiracy question is for court or jury to decide, the District Court has concluded that the Second Circuit rule has been upheld and simultaneously demonstrated that the *intent* of the charge at the original trial was to withdraw the question from the jury. Petitioner respectfully suggests that the Court reconsider, as it has the power to do, its denial of the writ in No. 112, O. T. 1952, and that the entire record be brought before it, together with the record as to this petition.

What was raised by the motion to vacate Sobell's sentence was the question whether it is compatible with due process and decent administration of criminal justice for a prosecutor to describe one later tried for mere membership in a "general conspiracy" as having actually perpetrated a most grave offense supposed to have been embraced in the objects of the conspiracy. At no stage of this proceeding has it been attempted to defend this practice, nor has it been denied.

What we argue here is the substance of the matter. But even in its "legalistic" aspect, it is a recognized principle that there is a substantial difference between membership in a conspiracy whose participants perpetrated diverse overt acts and actual participation in one of the acts. (*United States* v. *Rabinowich,* 238 U. S. 78, 87.) To say that petitioner's argument "in essence" is the same as that ruled against him on the previous appeal (R. 332) is not even supported by *Pinkerton* v. *United States,* 328 U. S. 640, 647, where an extreme instance of responsibility by a conspirator for a substantive offense was countenanced. Even there, reservation was made for "a different case * * * if the substantive offense committed by one of the conspirators * * * was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement."

But even if the qualitative difference between "atomic" and "ordinary" espionage would not be enough to insulate petitioner from the fictitious type of substantive conviction involved in *Pinkerton,* there is no imaginable justification for the prosecutor to have called Sobell an "atomic spy" in pre-trial announcements.

Documentation in the record supports the position of petitioner's counsel, that there existed, in the fall and winter of 1950-51, a widely prevalent conception of an atrocious arch-criminal, the Atom Spy (Eg. R. 187, 193). The apprehension concerning the allegedly undetected activity

of the Atom Spy was compounded by the concern created by the commencement of the production of the hydrogen bomb. (R. 187-8). The District Court were obliged to assume that the allegations in this respect were true.[17] In any event, they were not denied, and the fact that the hatred and loathing that must have been directed at the Atom Spy—as differentiated from such dislike as might be felt towards espionage in general—was on an entirely different level, was conceded and indeed, affirmatively asserted when the United States Attorney himself, in another proceeding in this case, stated: "Ordinary espionage is one thing. Atomic espionage is another" (R. 343).

The audience sought to be prejudiced against Sobell—from which the jurors were to be drawn—was not aware of the niceties of the law of conspiracy. The accusation and pre-trial condemnation was not accompanied with cautionary instructions as to the conditions necessary to justify imputation and constructive culpability. The accused was in custody, and at the outset, without counsel, during the first wave of publicity. The community must have formed

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[17] The knowingly fraudulent attachment to petitioner of the "label" of atom-spy, which involved utilization of a press-created "stereotype" to bring about the "scapegoating" of this petitioner, would have been the appropriate subject of expert testimony, if the District Judge declined to accept the contentions of the petition as to the effect of the characterization. As to the character of what such testimony might have been, we refer the Court to the Appendix to the Petition in No. 687, "The Scientific Techniques and Theorems for Study and Evaluation of Pretrial Publicity as Producing Community Prejudgment".

It is, of course, the public conception of the gravity of the offense, rather than the objective inaccurateness of the stereotype, that is of importance in evaluating pre-trial publicity. Consequently, it is not material that information now assembled may show the thesis of the trial to be a hoax (R. 87-112) or that Sen. Rep. 1211, 79th Cong., 2d Sess., on S. 1717 (Atomic Energy Act) stated: "Other countries of the world will be able to make atomic bombs. The monopoly which we hold at present is precarious and certain to be short-lived. * * * The degree of industrialization will determine how soon bombs can be made in quantity rather than the possibility of mastering the art of making the bomb."

a judgment condemning him out-of-hand, on the basis of the pre-trial publicity. And the appeal of the prosecutor, in summation, to have the jury consider "much that we have not disclosed" (C. R. 1519) gave license and invitation to the jury to take into account the pre-trial publicity not of record.

The "essence", then, of petitioner's point is this: that no amount of verbal legerdermain under the conspiracy umbrella could make it decent or honest or other than doubly reprehensible to have characterized him before the trial as an "atom spy".

3. THE CIRCUIT COURT'S MISCONCEPTION OF THE STATE OF THE RECORD AS TO THE PERL INCIDENT. The facts with respect to the indictment of William Perl, at a crucial moment during the trial of petitioner, and the prosecutor's conduct in connection therewith, are fully set forth in the Record (R. 177-84, 154-5).

At the precise moment during petitioner's trial when it was calculated to have the maximum impact, an indictment was ordered unsealed which accused a stranger to the case of perjury in that he denied knowing, *inter alia*, petitioner and a co-defendant. Not only had the alleged perjury been committed many months before, but the indictment so returned was never thereafter put on for trial. And the prosecutor, while actually engaged in petitioner's trial, called in the press with the result:

> "Mr. Saypol said also that Perl had been listed by the Government as a potential witness in the current atomic espionage trial. His intended role on the stand, Mr. Saypol added, was to corroborate certain statements made by David Greenglass and the latter's wife, who are key Government witnesses in the trial" (R. 179).

These facts were not of record on the original appeal; the facts supporting the inference that the indictment was

deliberately timed by the prosecutor could not possibly have been of record (R. 180-2).

The Circuit Court, within the limitations imposed by a 2255 proceeding in which a hearing has been denied, felt obliged to characterize the prosecutor's conduct, in stating to the press that Perl would have "corroborated" Greenglass, its otherwise uncorroborated witness, as "wholly reprehensible"; the tactics in respect of the entire matter as such that "cannot be too severely condemned"; the prejudice involved as making it necessary to "assume that, in this case, a cautionary instruction would not suffice, and that, if defendants had moved for a new trial, it should have been granted" (R. 334).

The Court, however, treats the record as supporting the conclusion that "defendants deliberately elected not to ask for a mistrial". Judge Swan goes on to say "They obviously concluded that the prosecutor's statement to the press had not prejudiced the jury against them."

These statements are in direct conflict with the record. Petitioner is entitled, as to this issue, to a reversal and a hearing, in view of the complete misconception evinced by the Circuit Court as to the facts concerning counsel's knowledge.[18]

The record shows the affidavit of Edward Kuntz (R. 207-8), trial counsel for petitioner, who, as the participant in the off-the-record colloquy before Judge Kaufman, is charged, by failure to move for a mistrial, with the "deliberate election" referred to in the Court's opinion. The Kuntz affidavit states that he "was not aware of the statement of Mr. Saypol quoted at page 4 of the affidavit [19] of Howard N. Meyer of November 24, 1952".

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[18] This was called to the attention of the Circuit Court by petition for rehearing (R. 340) but the petition for rehearing was denied without opinion.

[19] As printed, folio 229, page 179 of this record.

Obviously, an "election" cannot be premised on a fact which was not known to counsel. Nor did the Government contend that trial counsel did have knowledge of Mr. Saypol's extraordinary statement, or that it was discussed in the colloquy at the bench, which was confined to the timing of the Perl indictment.

The rules permitting subsequent challenge to prejudicial events in a courtroom, which may have been overlooked by counsel, but which "seriously affect the fairness, integrity or public reputation of judicial proceedings" (*Brasfield* v. *United States*, 272 U. S. 448), *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, must a fortiori, apply to events that take place outside the courtroom.

It could not lie in the prosecutor's mouth to now minimize publicity given his statement on the Perl indictment. If the statement was in fact made, and if petitioner and his counsel were in fact unaware of it at the time, relief should be granted. Compare this Court's views as to a similar episode in a civil case:

> "Hartford's officials and lawyers thought the article material. * * * They are in no position now to dispute its effectiveness". *Hazel Atlas Co.* v. *Hartford Empire Co.*, 322 U. S. 238 at p. 247.

United States Attorney Saypol obviously concluded that the indictment of Perl, and the publicity it occasioned, was material and useful in securing the conviction of the petitioner and his co-defendants. His successors are in no position to claim that it was ineffective in aiding to bring about the result it was calculated to achieve.

4. RELIANCE ON COMMON POINTS RAISED IN PETITION IN No. 687, THIS TERM.

In addition, and apart from the foregoing, this petitioner joins in the submission in the petition of the Rosenbergs, with respect to knowing use of perjured testimony, general pre-trial publicity, and the atom bomb "secret". He like-

wise joins in the submission with respect to the Perl indictment, although the point can simply be decided by reference to the Circuit Court's own characterization of the prosecutor's conduct and the obvious error of that Court in ignoring the record as to counsel's lack of immediate knowledge.

CONCLUSION

It is respectfully prayed that this petition for a writ of certiorari to review the judgment of the Court below be granted, and that on such review the judgment below be reversed.

Respectfully submitted,

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